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Attorneys for the M/V CHLOE Z

FILED
DISTRICT COURT OF GUAM

JAN 19 2007 *mba*

MARY L.M. MORAN
CLERK OF COURT

DISTRICT COURT OF GUAM

TERRITORY OF GUAM

TCW SPECIAL CREDITS, et al.,

Plaintiffs,

v.

FISHING VESSEL M/V CHLOE Z, et al.,

Defendants.

Case No. 96-00055

**DEFENDANT CHLOE Z'S
MEMORANDUM OF POINTS AND
AUTHORITIES IN SUPPORT OF
MOTION FOR LEAVE TO FILE
SUPPLEMENTAL BRIEF IN
OPPOSITION TO PLAINTIFFS'
MOTION TO DISBURSE FUNDS**

Defendant CHLOE Z respectfully requests that the Court allow CHLOE Z to file the attached supplemental brief and exhibits (Exhibit A) in opposition to plaintiffs' motion to disburse funds. Plaintiffs and CHLOE Z filed a Stipulation to allow CHLOE Z to file its Opposition on January 15, 2007; due to the federal holiday, CHLOE Z filed its Opposition on January 16, 2007. However, in the course of reviewing the thousands of docket entries in this case to file the Opposition, CHLOE Z's counsel inadvertently missed the attached information and exhibits, which are of critical interest to the Court in rendering a decision on the plaintiffs' motion. The filing of the supplemental brief will not cause delay or prejudice to any of the


ARRIOLA, COWAN & ARRIOLA, HAGATNA, GUAM 96910

parties. As of the filing of this motion, no hearing date has been scheduled yet for plaintiffs' motion to disburse funds.

WHEREFORE, Defendant CHLOE Z respectfully requests that the Court allow the filing of its Supplemental Brief and exhibits, attached hereto as Exhibit A.

RESPECTFULLY SUBMITTED this 19th day of January, 2007.

ARRIOLA, COWAN & ARRIOLA

By: 
ANITA P. ARRIOLA
Attorneys for F/V CHLOE Z

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DISTRICT COURT OF GUAM
TERRITORY OF GUAM

TCW SPECIAL CREDITS, et al.,

Plaintiffs,

v.

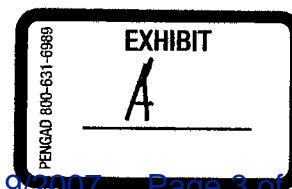
FISHING VESSEL M/V CHLOE Z, et al.,

Defendants.

Case No. 96-00055

**SUPPLEMENTAL BRIEF IN
OPPOSITION TO MOTION TO
DISBURSE FUNDS**

The undersigned counsel has just located additional documents which should be of extreme interest to this Court in ruling on this motion. One set of these documents is briefing and an order in this litigation between TCW on the one hand, and Matos and Pranjić on the other. *See* Exhibits 1, 2, and 3. The undersigned counsel did not participate in that briefing and, thus, failed to recall it prior to submitting an opposition brief. The second document is a declaration from counsel for claimant Vjeko Mazic. *See* Exhibit 4. As the Court will see, Mr. Mazic had Bill Dougherty as his attorney and Mr. George Butler as local counsel. Mr. Butler also serves as local counsel for plaintiffs Matos and Pranjić. It is understood that although Mr. Dougherty was not counsel of record for Matos and Pranjić, he did represent them. *See* Exhibit 5, p. 4, ll. 15-18.



TCW v. PRANJIC AND MATOS/THE SHOE IS ON THE OTHER FOOT

In May 2004, much like the current motion, TCW sought an order disbursing funds. Matos and Pranjic, who then held judgments totaling zero, but who were on appeal, vociferously objected. Matos and Pranjic pointed out that this Court had discretion to stay disbursement and that because the vessel sale proceeds were in the Registry of the Court, there was no need for security to be posted. *See* Motion for Stay of Execution of Judgment attached as Exhibit 1 and Opposition to TCW's Motion for Distribution of Remaining Vessel Sale Proceeds attached as Exhibit 2. Matos and Pranjic also argued in these pleadings that disbursing the funds would leave them with no practical remedy if they should win on appeal. *See* Exhibit 2, pp. 2-3. These are precisely the arguments being made by the CHLOE Z in opposing the current Motion to Disburse.

In an order issued August 2, 2004, the Honorable John C. Coughenour, sitting by designation, declined to allow disbursement of funds. Judge Coughenour also noted that "the purpose of a supersedeas bond is to protect the nonappealing party from the risk of a later uncollectible judgment." In that order, the Court noted that because "there are funds from the sale of the vessel already safely under control of the Court," that no additional security would be required and that disbursement of funds need not occur until all of the appeals were finally determined. *See* Exhibit 3, p. 4. Here, the CHLOE Z asks only for the same ruling while the United States Supreme Court considers its appeal.

THE VALUE OF THE JUDGMENTS/MAZIC CLAIM

In their motion, Pranjic and Matos complain that there are now insufficient funds in the Registry of the Court and that in some fashion the disbursement of the Mazic funds has jeopardized their security. The Court will note that attorney George Butler represented both Pranjic and Matos and Mazic. Attorney William Dougherty was the attorney for Mazic. Attorney Dwight Ritter was trial counsel for Matos and Pranjic, but Mr. Dougherty also represented their interests. *See* Exhibit 5, p. 4.

On June 6, 2002, Mr. Dougherty submitted the attached declaration as part of a settlement of Mr. Mazic's claim. *See* Exhibit 4. As set forth in that declaration, Mr. Dougherty pointed out that there were then more than adequate funds in the Registry of the Court and further noted "the Matos and Pranjic claims . . . total \$1,593,000 at most" Exhibit 4, p. 4 (emphasis in original). At that time an order to show cause was issued why the Mazic disbursement should not occur and neither Matos nor Pranjic objected. As shown by Mr. Dougherty's own declaration, there are adequate funds in the Registry of the Court to satisfy the judgments of Matos and Pranjic and no additional security is necessary.

RESPECTFULLY SUBMITTED this 19th day of January, 2007.

ARRIOLA, COWAN & ARRIOLA

By: _____
ANITA P. ARRIOLA
Attorneys for F/V CHLOE Z

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DISTRICT COURT OF GUAM

MAY 27 2004

MARY L. M. MORAN
CLERK OF COURT

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Plaintiffs ROBERT MATOS and,
SLOBODAN PRANJIC

DISTRICT COURT OF GUAM
TERRITORY OF GUAM

TCW SPECIAL CREDITS, ETC., et. al.,

Plaintiff and
Intervening Plaintiffs,

vs.

FISHING VESSEL CHLOE Z, ETC., et. al.,

Defendant

CIVIL ACTION 96-00055

MOTION FOR STAY OF EXECUTION
OF JUDGMENT

[FRCP 62(a)]
(Oral Argument Requested)

I.

INTRODUCTION

In approximately 1999, Plaintiffs-in-Intervention Robert Matos [MATOS] and Slobodan Pranjic [PRANJIC] obtained judgments against the fishing vessel M/V Chloe Z for

MOTION FOR STAY OF EXECUTION OF JUDGMENT [FRCP 62(a)] ORAL ARGUMENT REQUESTED - 1

EXHIBIT 1

1 approximately \$1.4 million. On approximately April 9, 2004, the District Court vacated their
2 judgments and entered judgment in favor of Defendant M/V Chloe Z. MATOS and PRANJIC
3 timely appealed this judgment.

4 MATOS and PRANJIC request this court grant a Stay of Execution of Judgment until
5 their appeal is resolved. Instead of a supersedeas bond, MATOS and PRANJIC request this
6 Court accept the existing Certificates of Deposit currently under the control of this Court as the
7 requisite security. MATOS and PRANJIC bring this motion in response to an attempt by the
8 mortgage holder [TCW] to take possession of these Certificates of Deposit, which they state
9 have a value of approximately \$1,695,767.36. (Declaration of Craig Miller in Support of TCW's
10 Motion for Distribution of Remaining Vessel Sale Proceeds, paragraph 4.)

11 **II.**
12 **THE PURPOSE OF A BOND PENDING APPEAL**
13 **IS TO PRESERVE THE *STATUS QUO***

14 Federal Rule of Civil Procedure 62(d) allows an appellant to prevent the execution of a
15 judgment during appeal. It protects both the "winning" and "losing" party by assuring funds will
16 be available at the conclusion of the appellate process. The Ninth Circuit stated: "Rule 62(d) is
17 a purely procedural mechanism to preserve the *status quo* during a stay pending appeal of a
18 district court decision..." Bass v. First Pacific Networks, Inc., 219 F.3d 1052 (9th Cir. 2000)

19 Here, granting a stay of execution (and denying TCW's request to distribute the vessel
20 proceeds) would preserve the *status quo*. As TCW admits in its declarations requesting
21 distribution, the funds are already safely under the control of this Court.

22 **II.**
23 **THIS COURT HAS THE DISCRETION AND POWER**
24 **TO GRANT A STAY OF EXECUTION OF JUDGMENT**
25 **AND DETERMINE THE NATURE AND**
26 **AMOUNT OF SECURITY**

27 The District Court has discretion to set the amount of a bond and approve the nature of
28 the security. Rachel v. Banana Republic, Inc. 831 F2d 1503 (9th Cir. 1987). Reduced or
alternative security may be requested by motion. International Telemeter Corp v. Hamlin Int'l
Corp. 754 F2d 1492 (9th Cir. 1985). The District Court also has the discretion to order partially
secured or unsecured stays if they do not unduly endanger the judgment creditor's interest in


1 ultimate recovery. Federal Prescription Service Inc. v. American Pharmaceutical Association,
2 636 F2d 755, 760 (DC Cir. 1980).

3 Here, granting a stay (and denying TCW's request to distribute all remaining vessel sale
4 proceeds) will not endanger TCW's potential interest in the ultimate recovery because the funds
5 are already safely under the Court's control. In its moving papers, TCW states the vessel sale
6 proceeds are currently invested in 2 Certificates of Deposit with a value of approximately
7 \$1,695,767.36. (Declaration of Craig Miller in Support of TCW's Motion for Distribution of
8 Remaining Vessel Sale Proceeds, paragraph 4.)
9

10 **III.**
11 **SUMMARY**

12 Granting this motion would insure the opportunity for justice for these injured seamen,
13 while still protecting the financial interests of TCW. Denying this motion would cause
14 irreparable harm to MATOS and PRANJIC if TCW is permitted to disburse the only proceeds
15 available to them. Based on the above, as well as their Opposition to TCW's Motion for
16 Distribution of Remaining Vessel Sale Proceeds filed with these papers, MATOS and PRANJIC
17 respectfully request this Court grant their Motion for Stay of Execution of Judgment.

18 Respectfully submitted,
19
20

21 
22 **GEORGE M. BULTER**
23 For Intervening Plaintiffs
24 **ROBERT MATOS and**
25 **SLOBODAN PRANJIC**
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Attorneys for Intervening
Plaintiffs ROBERT MATOS and,
SLOBODAN PRANJIC

DISTRICT COURT OF GUAM

TERRITORY OF GUAM

TCW SPECIAL CREDITS, ETC., et. al.,

Plaintiff and
Intervening Plaintiffs,

vs.

FISHING VESSEL CHLOE Z, ETC., et. al.,

Defendant

CIVIL ACTION 96-00055

OPPOSITION TO TCW'S MOTION
FOR DISTRIBUTION OF
REMAINING VESSEL SALE PROCEEDS

I.

INTRODUCTION

This litigation has continued for years and involved numerous trials. The many parties include 2 injured seamen, a fishing vessel and a mortgage holder. The motion before this Court

OPPOSITION TO TCW'S MOTION FOR DISTRIBUTION OF REMAINING VESSEL SALE PROCEEDS- 1

EXHIBIT 2

1 is an attempt by the mortgage holder [TCW] to disburse the only remaining asset available to the
2 injured seamen [MATOS and PRANJIC] before their appeal is heard.

3 In approximately 1999, Plaintiffs-in-Intervention Robert Matos [MATOS] and Slobodan
4 Pranjic [PRANJIC] obtained judgments against the fishing vessel M/V Chloe Z totaling
5 approximately \$1.4 million. On approximately April 9, 2004, the District Court vacated their
6 judgments and entered judgment in favor of Defendant M/V Chole Z. MATOS and PRANJIC
7 appealed.

8 During this extensive litigation, the vessel was sold and the Court maintained possession
9 of the proceeds from the sale. According to declarations submitted in TCW's latest motion, the
10 remaining vessel proceeds are approximately \$1.7 million. TCW asks this Court for the
11 remaining proceeds, in addition to the approximately \$11.5 million it indicates it has already
12 received. MATOS and PRANJIC request this Court deny TCW's motion and maintain
13 possession of the vessel proceeds until their appeal is decided.

14 MATOS and PRANJIC are also filing a MOTION FOR STAY OF EXECUTION OF
15 JUDGMENT concurrently with this OPPOSITION.

16 **II.**

17 **DISTRIBUTION OF THE VESSEL SALE PROCEEDS**
18 **PRIOR TO RESOLUTION OF THE INJURED SEAMEN'S**
19 **APPEAL WOULD CAUSE SEVERE HARDSHIP TO**
20 **MATOS AND PRANJIC**

21 MATOS and PRANJIC are former commercial fisherman of limited economic means.
22 They are "wards of the court in admiralty" and are entitled to the benefits and protections
23 afforded to claimants who are historically unable to protect their interests against more powerful
24 maritime ship owners and financial institutions. The vessel sale proceeds which are the subject
25 of this motion are the only funds available to compensate these men for their injuries which
26 occurred in 1991 and 1992.

27 If the mortgage holder [TCW] is permitted to distribute these proceeds while their
28 appeals are pending, MATOS and PRANJIC would be unable to obtain compensation if their
appeal is successful. MATOS and PRANJIC already obtained judgments against the owner of

1 the M/V Chloe Z but were unable to collect those judgments despite the existence of a multi-
2 million dollar insurance policy. Therefore, the remaining vessel proceeds are their last
3 opportunity to obtain justice from our legal system.

4 **II.**
5 **AN INJURED SEAMEN'S JUDGMENT IS SUPERIOR TO**
6 **A PREFERRED MORTGAGE LIEN**

7 46 U.S.C. 31326(b) provides that "preferred maritime liens" (which includes personal
8 injury judgments for seamen) are superior to the "preferred mortgage lien" held by TCW.
9 Therefore, if MATOS and PRANJIC are successful in their appeal, they would be entitled to
10 compensation before TCW's judgment is paid.

11 **III.**
12 **TCW'S INTERESTS ARE STILL PROTECTED**
13 **IF THE COURT DENIES THEIR MOTION**
14 **AND CONTINUES TO CONTROL THE**
15 **REMAINING VESSEL PROCEEDS**

16 Granting TCW's motion would leave the injured seamen completely unprotected if their
17 appeal is successful. However, if the Court denies their motion, TCW's financial interests are
18 still protected. If the injured seamen's appeal is not successful, TCW would be able to assert
19 their rights based on the mortgage and distribute the proceeds at the conclusion of the appellate
20 process. During the appeal, the remaining vessel sale proceeds would continue to accumulate
21 interest, for TCW's benefit.

22 **IV.**
23 **SUMMARY**

24 Granting TCW's motion to distribute the remaining vessel sale proceeds would cause
25 irreparable harm to MATOS and PRANJIC. Denying TCW's motion would insure the
26 opportunity for justice for these injured seamen, while still protecting the financial interests of
27 TCW. Based on the above, as well as the MOTION FOR STAY OF EXECUTION OF
28 JUDGMENT filed with these papers, MATOS and PRANJIC respectfully request this Court
deny TCW's motion.

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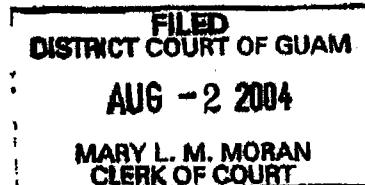
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Respectfully submitted,

George M. Butler
GEORGE M. BUTLER
For Intervening Plaintiffs
ROBERT MATOS and
SLOBODAN PRANJIC



DISTRICT COURT OF GUAM
TERRITORY OF GUAM

TCW SPECIAL CREDITS, et al.,
Plaintiffs,
vs.
F/V CHLOE Z, et al.,
Defendants.

Civil Case No. 96-00055

VJEKO MAZIC
Plaintiff-in-Intervention,
vs.
M/V CHLOE Z, et al.,
Defendants.

ORDER

This case is before the Court on the Plaintiffs'-In-Intervention, Robert Matos and Slobodan Pranjic, ("Plaintiffs-In-Intervention"), Motion for Stay of Execution of Judgment. Pursuant to Local Civil Rule 7.1(e)(3), this matter is appropriate for decision without the need for oral argument.¹ In addition, the Court has before it the Plaintiff's, TCW Special Credits ("TCW")

¹Local Civ.R. 7.1(e)(3) states "[i]n cases where the parties have requested oral argument, such oral argument may be taken off calendar by Order of the Court, in the discretion of the Court, and a decision rendered on the basis of the written materials on file."

COPY

1 Motion for Distribution of Remaining Vessel Sale Proceeds.² After reviewing the parties'
2 submissions, as well as relevant caselaw and authority, the Court hereby GRANTS the Plaintiff-In-
3 Intervention for Stay of Execution of Judgment and DENIES TCW's Motion for Distribution of
4 Remaining Vessel Sale Proceeds as set forth herein.

5 **BACKGROUND**

6 This matter was tried on the Plaintiffs'-in-Intervention, Robert Matos and Slobodan Pranjic,
7 complaints *in rem* for personal injuries brought against the Defendant fishing vessel Chloe Z
8 ("Chloe Z"). In 1999, the Plaintiffs-In-Intervention obtained judgments from Chloe Z for
9 approximately \$1.2 million. Thereafter, the Chloe Z appealed the case and the Ninth Circuit
10 affirmed in part, reversed in part and remanded the case back to the District Court for further
11 proceedings.

12 On the 20th and 21st day of May 2003, the Court heard the case on remand and confined the
13 issues as instructed by the Ninth Circuit to one, whether the Chloe Z should be equitably estopped
14 from raising a statute of limitations defense; and two, whether special circumstances exist that
15 would justify the Court's denial of prejudgment interest to Plaintiff-In-Intervention, Robert Matos.
16 After consideration of the evidence produced at trial and applicable law, the Court found that the
17 *in rem* causes of action of the Plaintiffs-In Intervention were in fact time barred by the statute of
18 limitations and that Chloe Z should not have been equitably estopped from raising a statute of
19 limitations defense. Accordingly, the Court granted judgment in favor of the Defendant Chloe Z
20 and vacated its prior judgment entered in favor of the Plaintiffs-In-Intervention. In light of the
21 Court's ruling as to the first issue, the Court did not address the second issue finding it was moot.
22 The Plaintiffs-In-Intervention timely appealed the Court's decision.

23 On May 12, 2004, the Plaintiff TCW filed a Motion for Distribution of Remaining Vessel
24 Sale Proceeds. TCW is a mortgagee with a preferred ship mortgage on the Defendant vessel Chloe
25

26
27 ²The Plaintiff TCW did not request a Oral Hearing on this matter and one was not scheduled.
28 However, for purposes of disposing of the Plaintiffs-In-Interventions' Motion for Stay of Execution, it
is appropriate for this Court to also address TCW's Motion for Distribution of Remaining Vessel Sale
Proceeds since both motions concern the same funds retained by this Court

1 Z.³ The Chloe Z was sold by the U.S. Marshal in 1996 and TCW's mortgage lien attached to the
2 vessel sale proceeds. The vessel sale proceeds were approximately \$6,710,000. However, before
3 those funds were disbursed to TCW, various disbursements were made to claims with senior
4 priority. For example, monies were paid for: 1) the reimbursement of costs associated with the
5 arrest and custodial fees of the U.S. Marshal; 2) settlement of a seaman's personal injury claim; and
6 3) numerous crew members of the Chloe Z for unpaid wages and related claims. There remains
7 approximately \$1,695,767 in the Clerk's registry of the vessel sale proceeds.⁴

8 Since the matter concerning the Plaintiffs-In-Intervention has been settled by the Court,
9 TCW requests that the remainder of the funds retained by the Court for the sale of the vessel be
10 disbursed. In response, the Plaintiffs-In-Intervention now request this Court to grant a Stay of
11 Execution of the Judgment until their appeal is resolved.

12 DISCUSSION

13 The Plaintiffs-In-Intervention contend the Court has the authority to stay the proceedings
14 in this matter pending the resolution of their appeal from the final judgment dismissing their claims
15 pursuant to Federal Rule of Civil Procedure 62(d). Rule 62(d) protects both parties by maintaining
16 the status quo. See Bass v. First Pacific Networks, Inc., 219 F.3d 1052 (9th Cir. 2000) ("Rule 62(d)
17 is a purely procedural mechanism to preserve the *status quo* during a stay pending appeal of a
18 district court decision . . . "). The Plaintiffs-In-Intervention claim that if the Court denies the
19 motion, it would cause irreparable harm if TCW is permitted the disbursement of the only proceeds
20 available to them should they prevail on their appeal.

21 However, TCW states that before a stay is issued the Court should require the Plaintiffs-In-
22 Intervention to post a supersedeas bond to cover TCW's economic injury. Rule 62(d) of the
23 Federal Rules of Civil Procedure provides:

24
25 ³TCW was granted a judgment in the amount of \$19,687,849.54. TCW holds now an
26 unsatisfied judgment well in excess of \$8,200,000. See Miller Decl. ¶ 5. That lien is secured by a lien
on the vessel sale proceeds retained by the Court. Id.

27 ⁴See Miller Decl. ¶ 4. The vessel sale proceeds currently "are invested in two 30 day
28 certificates of deposit ("CD"). As of March 31, 2004, one of the CDs has a balance of \$1,117,058.16.
As of April 27, 2004, the second CD has a balance of \$578,709.20. Some additional interest has
accrued since those dates."

1 When an appeal is taken the appellant by giving a supersedeas bond may obtain a
2 stay . . . The bond may be given at or after the time of filing the notice of appeal
3 or of procuring the order allowing the appeal, as the case may be. The stay is
4 effective when the supersedeas bond is approved by the court.

5 The Plaintiffs-In-Intervention claim that because there is no judgment in favor of any party that
6 must be protected a supersedeas bond is unnecessary.

7 The purpose of a supersedeas bond is to protect the non-appealing party from the risk of a
8 later uncollectible judgment and compensate him for any loss resulting from the stay of execution.
9 N.L.R.B. v. Westphal, 859 F.2d 818, 819 (9th Cir.1988). The Court is mindful that when equities
10 require it, it has the discretion to deviate from the terms of Rule 62. See Intern. Telemeter v.
11 Hamlin Intern. Corp., 754 F.2d 1492, 1495 (9th Cir. 1985) ("Although Federal Rule of Civil
12 Procedure 62 provides that a supersedeas bond may be used to stay execution of a judgment
13 pending appeal, the court has discretion to allow other forms of judgment guarantec."). Under the
14 circumstances, the Court recognizes the harsh inequities the Plaintiffs-In-Intervention would suffer
15 should they prevail and there is no recovery because the only source of funds for such has been
16 disbursed.⁵

17 In addition the Court finds that this case differs from the general type of case where the
18 party seeking a stay is a losing defendant who wishes to postpone the payment of a judgment and
19 must post a bond to ensure that should the plaintiff prevail on appeal there is a source of recovery.
20 There are funds from the sale of the vessel already safely under the control of the Court. Therefore,
21 granting a stay will not endanger TCW's potential interest in the ultimate recovery of those funds.
22 Although the yield of return on the retained funds is less than TCW would hope for, the Court notes
23 that the funds are invested in two certificates of deposit. If TCW believes there are other
24 investment vehicles for the funds which would yield a better return, it may always make the
25 appropriate request to the Court.

26 ///

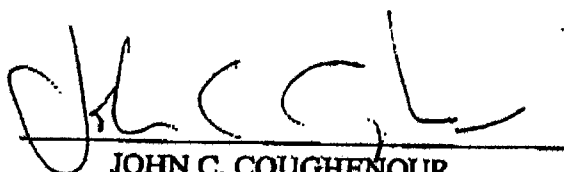
27 ⁵It is not this Court's intention to second guess the findings of the trial court and this Court
28 makes no determination as to the appropriateness of the prior rulings. However, it does find extremely
troubling the possible inequities the Plaintiffs-In-Intervention would suffer should they lose their
appeal.

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CONCLUSION

Upon consideration of the foregoing, the Court finds that there is a basis to grant the relief as requested in the Plaintiffs'-In-Intervention Motion for Stay of Execution of Judgment. Accordingly, the Court GRANTS the motion. Additionally, TCW's Motion for Distribution of Remaining Vessel Sale Proceeds is DENIED. The hearing scheduled for August 5, 2004 is hereby vacated.

SO ORDERED this 2nd day of August, 2004.


JOHN C. COUGHENOUR
United States District Judge*

Notice is hereby given that this document was entered on the docket on _____
No separate notice of entry on the docket will be issued by this Court.

Mary L. M. Moran
Clerk, District Court of Guam

By: _____ Date: _____

*The Honorable John C. Coughenour, United States Chief District Judge for the Western District of Washington, sitting by designation.

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7 Attorneys for Plaintiff-in-Intervention
8 VJEKO MAZIC

9 UNITED STATES DISTRICT COURT
10 FOR THE TERRITORY OF GUAM

11 TCW SPECIAL CREDITS, a
California general partnership,
12 as Agent and Nominee,

13 Plaintiff,

14 v.

15 FISHING VESSEL M/V CHLOE Z,
OFFICIAL NO. 653391, her
engines, nets, furniture, etc.
16 In Rem, CHLOE Z FISHING COMPANY,
INC., a Commonwealth of the
Northern Mariana Islands
17 corporation, In Personam,

18 Defendants.

19 VJEKO MAZIC

20 Plaintiff-in-Intervention

21 v.

22 M/V CHLOE Z, her engines,
equipment, tackle,
23 appurtenances, apparel,
furniture, and fish catch,
24 In Rem, CHLOE Z FISHING COMPANY,
INC., SPHERE DRAKE UNDERWRITING
25 MANAGEMENT, LTD., and
DOES 1 through 50,

26 Defendants.
27
28

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CASE NO. 96-00055

AMENDED DECLARATION OF
WILLIAM O. DOUGHERTY IN
SUPPORT OF PAYMENT OF
VJEKO MAZIC'S PERSONAL
INJURY CLAIMS IN FULL FROM
RES PROCEEDS

1 I, WILLIAM O. DOUGHERTY, hereby declare:

2 1. I am an attorney at law duly admitted to practice before the courts of the State of
3 California. I am a partner with the Law Firm of Dougherty, Hildre, Dudek & Haklar attorneys of
4 record in the above-referenced matter. All matters stated herein are of my own personal knowledge,
5 except for those matters stated upon information and belief.

6 2. I am the attorney of record in the matter of TCW Special Credits v. F/V Chloe Z.
7 Vjeko Mazic v. M/V Chloe Z. et al., Civil Case # 96-00055 and addressing the court's concerns with
8 respect to whether or not payment of Mazic's claim in full would jeopardize the availability of
9 adequate funds for payment of the Matos and Pranjic claims the undersigned responds as follows.

10 1.

11 **PRIORITY OF CLAIMS**

12 In this matter it is well established settled that the priority of claims is as follows:

- 13 1. Expenses of justice;
14 2. Crew wages;
15 3. Preferred Maritime Liens including tort claims for personal injuries;
16 4. Marine contract liens; and
17 5. Non-Maritime claims.

18 The undersigned represents to this court that the expenses of justice in this matter have
19 previously been paid in full. With respect to category number two; crew wages, all crew wage claims
20 have been paid in full.

21 The next category of payment would be preferred maritime liens including tort claims for
22 injury which would include the Matos, Mazic and Pranjic claims. These are the only unresolved tort
23 claims existing at this time. These are also the liens of the highest priority at this time as the
24 expenses of justice and crew wages have been fully discharged.

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II.

PRIORITY WITHIN A CLASS

The undersigned stipulates that the claims of Matos, Mazic and Pranjic are all in the same class and have equal priority.

III.

PAYMENT OF THE MAZIC CLAIM IN FULL

AT THIS TIME WILL NOT COMPROMISE

THE MATOS AND PRANJIC CLAIMS

In addressing this issue the undersigned would refer the court to TCW's Motion for Summary Judgment on Promissory Note, Mortgage and Other Collateral Instruments and For Partial Distribution of Vessel Proceeds filed with this court on October 26, 2001, a copy of which is attached hereto and marked as Exhibit "1". In connection with that document, TCW sets forth the history and procedural background of this matter and further summarizes the *in rem* claims of Pranjic, Mazic and Matos.

Pranjic's *in rem* claims were tried to this court and resulted in a judgment in the sum of \$577,420.00 on or about January 11, 1999. The Ninth Circuit's ruling reduced the award by approximately \$44,000.00.

Mazic's *in rem* claims were tried to this court and the court entered its final decision on January 11, 1999 entering an award in the sum of \$629,958.00 which was subsequently reduced by the Ninth Circuit in the approximate sum of \$43,000.00.

Matos' *in rem* claims were tried to this court with the court entering its decision on February 19, 1999 awarding judgment in the sum of \$621,514.00. The Ninth Circuit ruling with respect to pre-judgment interest in the matter, if awarded, could increase that sum by approximately \$242,000.00. Taking into effect the Ninth Circuit Court's ruling and allowing for post judgment interest the following represents a fair figure for the total liquidated *in rem* claims payable by lien on the Chloe Z vessel sale proceeds:

<u>Pranjic</u>	Trial Award \$577,420.00 (Ninth Circuit reduction \$44,000.00, accrued post judgment interest \$75,000.00) Total \$608,420.00.
----------------	--

1 Matos Trial Award \$621,514.00 (Potential Ninth Circuit increase for pre-judgment
2 interest \$242,000.00, accrued post judgment interest \$120,000.00) Total
3 \$983,514.00.

4 Mazic Settlement amount \$689,953.00 (plus interest at the rate of \$74.71 per day
5 from May 1, 2002 until paid)

6 **Grand Total: \$2,281,887.00**

7 As there is currently \$2,658,674.63 plus accrued interest on deposit with this Honorable
8 Court, there are more than adequate funds in the registry to satisfy the perfected maritime liens of
9 Mazic, Matos and Pranjic. [Even after the payment of Mazic's claim in full in the sum of
10 approximately \$691,000.00 including interest to date, the registry will still be left with \$1,965,000.00
11 to pay the Matos and Pranjic claims which total \$1,593,000.00 at most, leaving an excess of at least
12 \$372,000.00.] Therefore it is respectfully requested that this court order payment of the Mazic claim
13 in full at this time as it will clearly not compromise full payment of the claims of Matos and Pranjic
14 once they have been determined.

15 I declare under penalty of perjury under the laws of the State of California that the foregoing
16 is true and correct and that this Declaration was executed on this 6th day of June, 2002 at San Diego,
17 California.

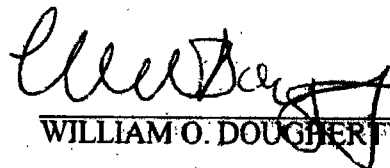
18 
19 WILLIAM O. DOUGHERTY

EXHIBIT "1"

FILED
DISTRICT COURT OF GUAM

OCT 26 2001

WILLIAM MORAN
CLERK OF COURT

1 Craig Miller
2 DAVIS WRIGHT TREMADE LLP
3 2600 Gensary Square
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7 D. Paul Vernier, Jr.
8 McKEOWN • VERNIER • PRICE • MAHER
9 A Joint Venture of McKeown Price LLP
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14 Tel (671) 477-7059

15 Attorneys for Plaintiff
16 TCW Special Credits

17 UNITED STATES DISTRICT COURT
18 DISTRICT OF GUAM

19 TCW SPECIAL CREDITS, et al.,

20 Plaintiff,

21 v.

22 FISHING VESSEL CHLOE Z, et al.,

23 Defendant.

24 JUAN BARNADIARAN, et al.,

25 Plaintiffs-in-
26 Intervention.

27 RELATED CLAIMS-IN-INTERVENTION

No. 96-00055

TCW'S MOTION FOR SUMMARY
JUDGMENT ON PROMISSORY
NOTE, MORTGAGE AND OTHER
COLLATERAL INSTRUMENTS;
AND FOR PARTIAL DISTRIBUTION
OF VESSEL SALE PROCEEDS TO
MORTGAGEE; CERTIFICATE OF
SERVICE

[ORAL ARGUMENT NOT
REQUESTED]

Plaintiff TCW Special Credits ("TCW") moves for summary judgment on its claims on the defaulted promissory note, and the preferred ship mortgage and other collateral instruments securing the promissory note; and for distribution to TCW of a portion of the vessel sale proceeds.

TCW'S MOTION FOR SUMMARY JUDGMENT - 1

1 TCW does not request oral argument.

2 As the Court knows, there has been a final, comprehensive settlement reached between
3 TCW and Crew Claimants, and that settlement has been fully implemented. See, Stipulation and
4 Order Approving Settlement, Etc. ("Settlement Approval Order"), entered September 19, 2001.
5 The settlement between TCW and Crew was reached only after lengthy negotiation and mutual
6 compromise. That settlement resolves litigation concerning the Crew wage claims that has lasted
7 more than five years, and has included scores of motions to this court, a trial, and multiple
8 appeals. TCW is therefore most pleased to be able to advise the Court of the settlement with the
9 Crew.

10 Following in logical sequence from that settlement, TCW's present motion is a necessary
11 next step toward the final completion of this litigation.

12 Relative to this motion, there are no facts in dispute.

13 A. Summary Judgment and Order of Disbursal Requested.

14 TCW requests entry of summary judgment against defendant Chloe Z Fishing Co., Inc.
15 ("CZFC, Inc.") for money judgment on the sum certain owed by CZFC, Inc., on its defaulted
16 promissory note (the "Term Loan Note"); and for foreclosure of the preferred ship mortgage
17 ("Preferred Ship Mortgage") the F/V CHLOE Z, Official No. Official No. 653391 ("Vessel") and
18 of the other collateral instruments sued on in TCW's verified Complaint.

19 As of September 30, 2001, the defaulted indebtedness owed by CZFC, Inc., on the Term
20 Loan Note is \$19,225,956.01, exclusive of legal fees. Interest continues to accrue on the
21 defaulted principal balance of the Term Loan Note at the rate of \$3,580.57 per diem, from
22 September 30, 2001, until paid. Mazurek Declaration, ¶ 3.

23 TCW also requests an order disbursing to TCW proceeds of the sale of the Vessel, now
24 held in the registry of the Court, but reserving in the registry ample funds for eventual
25

1 satisfaction of liens as may be established by personal injury claimants Slobodan Pranjic, Robert
2 Matos and Vjeko Maric (together, "Personal Injury Claimants").

3 **B. Evidence Relied Upon.**

4 In support of this motion, TCW relies on the following evidence:

- 5 1. The prior orders of this Court, as cited in this memorandum.
- 6 2. The Clerk's entry of defaults, on file in this action.
- 7 3. Declaration of Mariusz Mazurek, dated October 16, 2001, filed herewith.
- 8 4. TCW's verified Complaint ("TCW Complaint") and exhibits attached thereto, on
9 file in this action.
- 10 5. Declaration of D. Paul Vernier, Jr., presenting the Statement of Account, dated
11 October 24, 2001, from US District Court Office of the Clerk.

12 **C. History and Procedural Background of Case.**

13 As established in the verified TCW Complaint, TCW is the holder of the Preferred Ship
14 Mortgage the CHLOE Z, which secures the obligations of the Vessel's owner, CZFC, Inc., under
15 a Loan Agreement and Term Loan Note. TCW holds additional security for those obligations by
16 virtue of CZFC, Inc.'s grants of security and assignment under a Security Agreement and
17 Assignment of Insurances. To the best knowledge of TCW, no party in this action has ever
18 materially contested the accuracy of any allegation made in the TCW Complaint.

19 The Term Loan Note was made and delivered by CZFC, Inc., on October 15, 1991. The
20 original lender to CZFC, Inc., and the indicated payee on the Term Loan Note, is a Norwegian
21 bank, Christiania Bank. However, TCW purchased Christiania Bank's interest in the Term Loan
22 Note (and in all supporting collateral, including the Preferred Ship Mortgage) on June 30, 1995.
23 CZFC, Inc.'s obligations under the Term Loan Note have been in default since July 1, 1993.

24 The TCW Complaint was filed on July 5, 1996.

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18 materially contested the accuracy of any allegation made in the TCW Complaint.

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20 original lender to CZFC, Inc., and the indicated payee on the Term Loan Note, is a Norwegian
21 bank, Christiania Bank. However, TCW purchased Christiania Bank's interest in the Term Loan
22 Note (and in all supporting collateral, including the Preferred Ship Mortgage) on June 30, 1995.
23 CZFC, Inc.'s obligations under the Term Loan Note have been in default since July 1, 1993.

24 The TCW Complaint was filed on July 5, 1996.

1 TCW immediately moved for a warrant of arrest of the Vessel. The Vessel was forthwith
2 arrested, as was her fish catch aboard ("Fish Catch").

3 Proper service and notice of the action and of the arrest was given to all interested persons.
4 Ser. Certificate of Mailing, filed July 11, 1996 (notice given to all lien claimants); return of
5 service on registered agent for GZFC, Inc., dated July 16, 1996; and Declaration of Maggie
6 Castro, regarding publication of Notice in Pacific Daily News, filed July 18, 1996.

7 The Clerk on September 26, 1996, entered a Default against CHLOE Z and GZFC, Inc., as
8 to TCW's Complaint. Also, on April 20, 1998, the Court entered an Order of Default Against
9 All Non-Appearing Claimants to the Vessel and Against Chloee Z Fishing Co., Inc.

10 The following claimants asserted claims against the Vessel and/or its Fish Catch by way
11 of complaints-in-intervention: Starkist Caribe, Inc. and Star-Kist Foods, Inc. (the Starkist parties
12 together filed one complaint, on July 26, 1996); a group of unpaid seamen who served aboard the
13 CHLOE Z ("Crew Claimants") (filed July 30, 1995, and amended and supplemented thereafter);
14 Shell Guam, Inc. (filed August 19, 1996); and Clipper Oil Company (filed October 9, 1996); and
15 the three Personal Injury Claimants.

16 An Order for Interlocutory Sale of the Fish Catch was entered on August 9, 1996. On
17 August 20, 1996, the Fish Catch was sold at auction by the US Marshal for the winning bid of
18 \$725,000. The proceeds of that sale ("Fish Catch Sale Proceeds"), net of certain sale costs, was
19 deposited in the registry of the Court.

20 An Order for Interlocutory Sale of the Vessel was entered on October 17, 1996. On
21 December 3, 1996, the CHLOE Z was sold at auction by the US Marshal for the winning bid of
22 \$6,710,000. The proceeds of that sale ("CHLOE Z Vessel Sale Proceeds"), net of certain sale
23 costs, was deposited in the registry of the Court.

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26 TCW'S MOTION FOR SUMMARY JUDGMENT - 4

1 The complaints in intervention of Starist, Shell-Gunn, and Clipper Oil Company
2 (collectively, "Trade Claimants"), were resolved by settlement with PCW reached in 1998. In
3 order to achieve those settlements, PCW paid a substantial sum of money to each of the Trade
4 Claimants, and received an assignment of the Trade Claimant's claim and lien rights. Mazurek
5 Decl. ¶ 4 and Exs. B, C and D. PCW entered those settlements in an effort to simplify the
6 litigation. At the time, PCW was well aware that the liens of the Trade Claimants were "out of
7 the money," since the senior liens – namely, the custodia legis lien, the Crew wage lien, the
8 Personal Injury Claimant lien, and the Preferred Ship Mortgage lien – would certainly consume
9 all available Vessel Sale Proceeds and Fish Catch Proceeds (and yet still leave a multi-million
10 dollar shortfall in the payment of the Preferred Ship Mortgage lien¹).

11 As noted above, the claims of all Crew also have been resolved by settlements. All
12 settlements, including settlements made early in the case (and specifically including the six
13 disputed settlements) have now fully agreed, paid and resolved, and all Crew wage claims have
14 been entirely and finally resolved. See, Settlement Approval Order, entered September 19, 2001.

15 The Settlement Approval Order authorized disbursement to the Crew of nearly the entirety of
16 the Fish Catch Sale Proceeds; and further authorized disbursement of the then relatively small
17 remaining balance of Fish Catch Sale Proceeds to PCW in partial satisfaction of PCW's approved
18 custodia legis lien. Those disbursements exhausted the entire Fish Catch Sale Proceeds.

19 Therefore, as a result of the various settlements entered by lead plaintiff PCW, the case is
20 much closer to final resolution, and now stands considerably simplified. The structure of the case
21 is now as follows:

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24 ¹ It is a mathematical certainty that the multi-million dollar shortfall will exist even after
25 realization on all collateral available in this case and in the case of TCW v. E/V KASSANDRA Z
pending in the High Court of American Samoa.

- There remains on deposit in the registry of the Court the total funds in the amount of \$7,742,869.29, as of October 24, 2001. Vernier Declaration. Those funds continue to accrue interest². Those funds are the remaining CHLOE Z Vessel Sale Proceeds.
- The only asserted liens against the CHLOE Z Vessel Sale Proceeds are:
 - FIRST, the in rem claims of the Personal Injury Claimants;
 - SECOND, the lien of the Preferred Ship Mortgage, held by TCW; and
 - THIRD, the liens of the Trade Claimants Starkist, Shell-Guam, and Clipper-Oil; however, as noted above, those liens have been assigned to TCW, following TCW's substantial payments to and settlements with the three Trade Claimants.

D. Personal Injury Claimant Liens.

The in rem claims of the three Personal Injury Claimants, Pranjic, Matos and Mazic, have now been substantially determined by the Court. All three in rem cases have been tried, appealed, and remanded.

At this point, it is irrefutably clear from the arithmetic that the remaining CHLOE Z Vessel Sale Proceeds are at least some \$5,500,000 in excess of the reserves needed to satisfy the maximum possible in rem liens of all three Personal Injury Claimants.

Here is the history of the in rem claims of the Personal Injury Claimants, leading to the present maximum liquidation value of those claims:

² The interest being earned on the CHLOE Z Vessel Sale Proceeds invested by the Clerk compares favorably to the federal judgment interest rate. The investment rate now being paid on the funds, held in two instruments, one at the Bank of Guam and another at the Bank of Hawaii, is 2.37% and 2.75%, respectively. By comparison, as of October 19, 2001, the current federal judgment interest rate is 2.37% (see, 28 U.S.C. §1961, specifying that, after December 21, 2000, the federal judgment interest rate is equal to the weekly average of 1-year constant maturity Treasury yield, which yield is available on the Federal Reserve website, www.federalreserve.com.)

- Pranjic's in rem claims were tried beginning July 27, 1998. The Court entered its trial decision on January 11, 1999. The judgment award was \$577,420. The Ninth Circuit's ruling reduced the award by about \$44,000.
- Mazic's in rem claims were tried beginning July 15, 1998. The Court entered its trial decision on January 11, 1999. The judgment award was \$622,958. The Ninth Circuit ruling reduced the award by about \$43,000.
- Matos's in rem claims were tried beginning July 20, 1998. The Court entered its trial decision on February 19, 1999. The judgment award was \$621,514. The Ninth Circuit ruling may (though not certainly) result in an increase to the award, with the addition of prejudgment interest. That prejudgment interest, if awarded, can reasonably be estimated at a maximum of, say, \$242,000 (6.5 years x 6.0%).

All three cases now await the trial court's decision on post-remand motions in accordance with the appellate court's opinions.

Therefore, accounting for the Ninth Circuit rulings, and allowing for post-judgment interest, the following is the total liquidated in rem claims, which are payable by lien on the CHLOE Z Vessel Sale Proceeds:

Pranjic

Trial Award	577,420
Ninth Circuit Reduction	(44,000)
Accrued Post Judgment Interest ¹	50,675
Total	\$584,095

¹ This interest (for all three Personal Injury Claimants) is calculated at: 1 year x 6.0% + 1 year x 3.5%, a very liberal estimation reflecting both the date of remand of the these cases and the applicable federal judgment interest rates since that date (the reference instrument used to determine the federal judgment interest rate changed as of December 21, 2000).

1 (still leaving, as noted above, a substantial deficiency on the Ship Mortgage Lien). At that point,
2 the case will be concluded.

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4 **E. Lien Priority.**

5 There is no issue as to lien priority.

6 As a matter of law, the lien priority is as follows:

7 (1) TCW's lien for custodial expenses (now fully paid);

8 (2) Crew's wage liens (all Crew claims are resolved and fully paid);

9 (3) maritime tort liens of the Personal Injury Claimants' in rem
10 claims (liquidated to maximum amount of \$2.2 million, not yet paid);

11 (4) TCW's preferred mortgage lien (liquidated and undisputed;
12 not yet paid); and

13 (5) the Trade Claimants' liens (all paid by TCW, and assigned and held by TCW).³

14 See 46 U.S.C. §§ 31325, 31326; Cargill, Inc. Ship Insurance Forening v. M/T Pacific Dawn, 876
15 F. Supp. 508, 510-11 n.2 (S.D.N.Y. 1995); United States v. One 254-Ft. Freighter M/V Andoria,
16 370 F. Supp. 413, 415 (E.D. La. 1983), aff'd, 768 F.2d 597 (5th Cir. 1985); T. Schoenbaum,
17 Admiralty and Maritime Law § 8-6 (1987).

18 TCW stipulates that the in rem liens of the Personal Injury Claimants, to the extent finally
19 determined, are senior to TCW's Preferred Ship Mortgage lien and to the Trade Claimants' liens
20 now held by TCW as assignee.

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24 ³ Because the proceeds of the CHLOE-2 are insufficient to satisfy TCW's preferred mortgage
25 lien, the priority of the remaining claims is insignificant.

1 **F. Judgment and Order Requested.**

2 TCW in this case is an innocent, good faith Preferred Ship Mortgagee. TCW funded the
3 arrest and custodianship of the Vessel, for the benefit of all parties. TCW has entered settlements
4 with all possible parties: the Crew, Starlink, Shell-Guam and Clipper Oil. (TCW cannot enter
5 settlements with the Personal Injury Claimants, since those claims are being defended by
6 insurance defense counsel.) TCW patiently has waited to realize on its mortgage lien for more
7 than some five and one-half years.

8 Summary judgment should issue when there is no genuine issue of material fact. Fed. R.
9 Civ. P. 56, as is the case with this motion.

10 Submitted herewith is a requested form of Judgment and Order.

11 The final judgment amount should be a sum equal to \$19,225,956.01 plus interest at the
12 per diem rate of \$3,580.57, from September 30, 2001, until date of entry of judgment, and
13 disbursement to TCW should be ordered as requested in the amount of \$5,500,000.00.

14 DATED this 26th day of October, 2001.

15 *Attorneys for TCW Special Credits*

16 **McKEOWN • VERNIER • PRICE • MAHER**

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18 By


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26 **D. PAUL VERNIER, JR.**

1 **GEORGE M. BUTLER, ESQ.**
2 **BUTLER & TELFORD BUTLER**
3 251 Martyr Street, Suite 104
4 Agana, Guam 96910
5 Telephone: (671) 472-6895

6 **WILLIAM O. DOUGHERTY, ESQ.**
7 **DOUGHERTY, HILDRE, DUDEK & HAKLAR**
8 2550 Fifth Avenue, Suite 600
9 San Diego, California 92103
10 Telephone: (619) 232-9131

11 **TCW Special Credits, et al. v. Fishing Vessel M/V Chloe Z, et al.**
12 **U.S. District Court of Guam, Case No. 96-00055**

13
14
15 **DECLARATION OF SERVICE**

16 I, the undersigned, declare: That I am, and was at the time of service of the papers herein
17 referred to, over the age of 18 years, and not a party to the action; and I am employed in the County
18 of San Diego, California. My business address is 2550 Fifth Avenue, Suite 600, San Diego,
19 California 92103. I further declare that I am readily familiar with the business practice for collection
20 and processing of correspondence for mailing with the United States Postal Service pursuant to
21 which practice this correspondence will be sealed with the postage thereon fully prepaid, deposited
22 with the United States Postal Service this same day in the ordinary course of business. On June 6,
23 2002, I served the following document(s):

24
25 **AMENDED DECLARATION OF WILLIAM O. DOUGHERTY IN**
26 **SUPPORT OF PAYMENT OF VJEKO MAZIC'S**
27 **PERSONAL INJURY CLAIMS IN FULL FROM RES PROCEEDS**

28 on the parties in this action addressed as follows:

29 **SEE ATTACHED SERVICE LIST**

30 I declare under penalty of perjury that the foregoing is true and correct. Executed on June
31 6, 2002, at San Diego, California.

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APR 02 2001

BY: JP TIME: 10:35FILED
DISTRICT COURT OF GUAM

APR 02 2001

MARY L.M. MORAN
CLERK OF COURT

IN THE DISTRICT COURT OF GUAM
TERRITORY OF GUAM

TCW SPECIAL CREDITS, ETC., et al.,

Plaintiffs,

v.

FISHING VESSEL CHLOE Z, ETC., et al.,

Defendants.

CIVIL CASE NO. CIV96-00055

INTERVENING PLAINTIFFS
ROBERT MATOS AND
SLOBODAN PRANJIC:

- a. NOTICE;
- b. MOTION FOR PROTECTIVE ORDER;
- c. MEMORANDUM;
- d. CERTIFICATE OF SERVICE.

(1) NOTICE

Intervening Plaintiffs Robert Matos and Slobodan Pranjic ("Matos & Pranjic") give notice that they do not request oral argument on the following motion for protective order ("Motion").

(2) MOTION

Matos & Pranjic move the Court for an order granting the following relief. The Court prohibits defendant Fishing Vessel Chloe Z ("Chloe Z") from taking the planned deposition ("Deposition") of attorney Jean Melancon ("Melancon").

Matos & Pranjic request the following alternative relief in the event the Court denies the primary order sought by intervening Plaintiffs. The Court restricts the Melancon Deposition to a specific time frame, length and content. Such parameters

1 should be consistent with and limited to only those discoverable facts Chloe Z
2 establishes pursuant to its threshold burden of proof.

3 Matos & Pranjic further request that the Court order Chloe Z to produce for In
4 camera inspection the transcripts of Melancon's prior two depositions given in this
5 action.

6 The grounds for the Motion include:

7 1. Melancon's status as former designated local attorney for Matos & Pranjic
8 in both in this action and the related prior Civil Case Numbers 94-00013 and 94-00014;

9 a. Chloe Z's announced intent to take the Melancon Deposition;

10 b. Chloe Z's failure to discharge its burden of proof that:

11 a. no other means exist to secure the information Chloe Z seeks;

12 b. such information has become relevant and non-privileged; and

13 c. this information remains crucial to the preparation of the case.

14 Federal Rules of Civil Procedure ("FRCP") 26(c)(1), and 26(b)(1); and related
15 cases interpreting attorney deposition authorize this relief.

16
17 (3) MEMORANDUM

18 Chloe Z wishes to obtain the pre-trial deposition of attorney Jean Melancon.
19 Matos & Pranjic attorneys Dwight F. Ritter and Donald F. Hildre designated Melancon
20 as local counsel both in this action and in related prior Civil Cases Numbers 94-00013
21 and 94-00014. Melancon acted in that capacity between March 1994 and August 1997.

22 Chloe Z candidly acknowledges that:

23
24 "In cases involving the deposition of opposing counsel in a matter, the party seeking
25 the deposition must demonstrate its propriety and need before the deposition may go
26 forward. Shelton v. American Motors Corp. 805 F.2d 1323, 1327 (8th Cir., 1986);
27 American Casualty Co. v. Krieger 160 F.R.D. 582, 588 (S.D.Cal., 1995). More
28 importantly, the party must establish the following: (1) no other means exist to obtain
the information than to depose opposing counsel; (2) the information sought is relevant
and non-privileged; and (3) the information is crucial to the preparation of the case.
Shelton at 805 F.2d 1327."

1 See pending Chloe Z December 28, 2000 motion for protective order ("Chloe Z
2 Motion") precluding the depositions of Chloe Z counsel, at p. 3.

3 This rule applies to the proposed deposition of Melancon. Melancon withdrew
4 in 1997 as designated local counsel. Melancon continues to possess however, privileged
5 information having no relevance whatsoever to any pending claims or defenses
6 asserted by Chloe Z. See. Smith Ex.Rel. Smith v. U.S. 193 F.R.D. 201, 214-216 (D.Del.,
7 2000), prohibiting the depositions of two prior investigating attorneys for defendant (as
8 distinguished from current trial counsel). These attorneys lacked any unique
9 discoverable information.
10

11
12 Chloe Z hence retains the initial duty to demonstrate to this Court:

- 13 a. specific facts that Chloe Z wishes to elicit from Melancon;
14
15 b. no other means exist to obtain that information;
16
17 c. the information sought is relevant and not privileged;
18
19 d. the information is crucial to preparation of the case.
20

21 Chloe Z has not discharged that burden of proof. Chloe Z has placed no facts in
22 the record that tend to establish any of the essential four elements recited above. No
23 Chloe Z deposition of Melancon should proceed absent Chloe Z satisfaction of these
24 requisites.

25 Chloe Z has previously twice taken Melancon's deposition during 1997. Pranjic
26 & Matos do not have copies of those transcripts. The transcripts should demonstrate to
27
28

1 the Court (some if not all) the scope of Chloe Z's proposed examination of Melancon;
2 and whether such questions are permissible.

3 One of the unknown issues (at this time) on which Chloe Z might wish to elicit
4 facts from Melancon includes the question of whether Chloe Z has become equitably
5 estopped to raise a statute of limitations defense. See, Chloe Z Motion at pp. 4-6. Chloe
6
7 Z asserts in pertinent part that:

8 "The equitable estoppel arguments in the hearing to be scheduled should focus very
9 simply on the issue of "who said what to whom" which may have improperly misled
10 the plaintiffs." Id., at p 5.

11 Chloe Z however, makes no suggestion that Melancon has unique knowledge of
12 any such representations. Chloe Z in fact refers only to declarations from Matos &
13 Pranjin attorney Dwight F. Ritter Id., at p 2.

14 Chloe Z has deposed Matos & Pranjin lead attorney Dwight Ritter on more than
15 one occasion. Chloe Z has also deposed on multiple occasions Matos & Pranjin other
16 lead counsel Donald F. Hildre and William O. Dougherty, See, Dwight Ritter
17 Declaration accompanying this paper. No Chloe Z showing has occurred that
18 Melancon possesses unique facts; or that any material misrepresentation was made to
19 Melancon or made only to him.

22 CONCLUSION

23 The planned Chloe Z deposition of attorney Melancon should be prohibited; and
24 a protective order entered within the authority of FRCP 26(c)(1).
25

26 Matos & Pranjin alternatively request that the Court carefully circumscribe
27 Melancon's Deposition. Should Chloe Z somehow satisfy its burden of proof and the
28

1 above legal standard, then the Court should carefully restrict Chloe Z's deposition by
2 way of time frame, length and content. Only those narrow specific facts that Chloe Z
3 demonstrates comply with the above test should be subject of examination. The prior
4 deposition transcripts of Melancon should be examined in this regard in order to
5 facilitate the Court's ruling.
6

7
8
9 **(4) EXECUTION AND CERTIFICATE OF SERVICE**

10 I am signing this paper in my capacity as designated local counsel for Matos &
11 Pranjic. I am serving the paper in the following manner, I am causing a filed copy to
12 be hand delivered to the offices of Guam counsel for each appearing party on or
13 before April 10, 2001.
14

15 **BUTLER & TELFORD BUTLER**
16 Attorney for Intervening Plaintiffs
17 Robert Matos and Slobodan Pranjic

18 Date: 3/30/01

19 By: George M. Butler
20 **GEORGE M. BUTLER**
21
22
23
24
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27
28

RECEIVED

ARRIOLA, COWAN & ARRIOLA

BUTLER & TELFORD BUTLER

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APR 02 2001

BY: jt TIME: 10:35FILED
DISTRICT COURT OF GUAM

APR 02 2001

MARY L.M. MORAN
CLERK OF COURTIN THE DISTRICT COURT OF GUAM
TERRITORY OF GUAM

TCW SPECIAL CREDITS, ETC., et al.,

Plaintiffs,

v.

FISHING VESSEL CHLOE Z, ETC., et al.,

Defendants.

CIVIL CASE NO. CIV96-00055

GEORGE M. BUTLER
DECLARATIONIN SUPPORT OF INTERVENING
PLAINTIFFS ROBERT MATOS
AND SLOBODAN PRANJIC
MOTION FOR PROTECTIVE ORDER

I, GEORGE M. BUTLER, make the following declaration.

1. I am an individual of the age of majority and competent to give testimony in this action.

2. I have personal knowledge of the facts stated in this declaration. The basis of my knowledge includes my experience with the events described below. I would testify truthfully as to these facts if called by the Court.

3. I am designated local counsel in this action for intervening Plaintiffs Robert Matos and Slobodan Pranjic.

4. I am attaching to this paper a true and correct copy of the April 2001 Dwight F. Ritter declaration. I am arranging to supplement this copy by filing the original as soon as the original can be delivered by express mail from California.

I declare under penalty of perjury under laws of the United States of America that the foregoing is true and correct.

Date: 3/30/01George M. Butler
GEORGE M. BUTLER

DWIGHT F. RITTER
LAW OFFICES OF DWIGHT F. RITTER
170 LAUREL STREET
SAN DIEGO, CALIFORNIA 92101
TELEPHONE: 619 238 1811

MARCH 28, 2001
DRAFT

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ATTORNEYS FOR INTERVENING PLAINTIFFS
ROBERT MATOS AND SLOBODAN PRANJIC

DISTRICT COURT OF GUAM
TERRITORY OF GUAM

TCW SPECIAL CREDITS, INC.,)	CIVIL CASE NUMBER
ET. AL.,)	96-00055
)	
PLAINTIFF AND)	
INTERVENING PLAINTIFFS,)	DWIGHT F. RITTER
)	DECLARATION
VERSUS)	
)	IN SUPPORT OF
FISHING VESSEL CHLOE Z,)	INTERVENING PLAINTIFFS
ETC., ET. AL.,)	ROBERT MATOS AND
)	SLOBODAN PRANJIC
DEFENDANTS.)	MOTION FOR PROTECTIVE ORDER

**Civil Case Number CIV96-00055
April 2001
Dwight F. Ritter Declaration**

I, Dwight F. Ritter, make the following declaration.

- 1. I am an individual of the age of majority and competent to give testimony in this action.**
- 2. I have personal knowledge of the facts stated in this declaration. The basis of my knowledge includes my experience with the events described below. I would testify truthfully as to these facts if called by the Court.**
- 3. I am record counsel in this action for Intervening Plaintiffs Robert Matos and Slobodan Pranjic ("Matos & Pranjic").**
- 4. I designated attorney Jean Melancon in this action as my local Guam counsel. Attorney Melancon also acted as my designated local counsel in related prior Civil Case Numbers 94-00013 and 94-00014.**
- 5. Attorney Melancon acted as my designated local counsel in these three actions between approximately March 1994 and August 1997.**
- 6. I refer to the March 31, 1997, First Amended Complaints filed by Matos & Pranjic in this action. I prepared these pleadings. Defendant**

Page 2

From

Civil Case Number CIV96-00055

April 2001

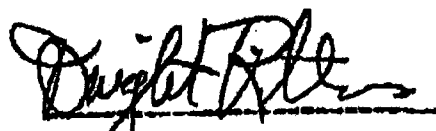
Dwight F. Ritter Declaration

CHLOE Z has taken my deposition ~~case~~^{ONCE} concerning the misrepresentations pled in these documents. Defendant CHLOE Z has also secured the depositions of Matos & Pranjic's other lead attorneys Donald F. Hildre and William O. Dougherty concerning these pleadings.

7. I am given to understand that CHLOE Z secured or attempted to take the deposition of Jean Melancon on two occasions in 1997. To the best of my knowledge, Matos & Pranjic did not receive copies of these deposition transcripts.

I declare under penalty of perjury under laws of the United States of America that the foregoing is true and correct.

Executed on April ____ 2001


Dwight F. Ritter

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